93-202

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

KURAHARA & MORRISSEY,
Petitioner, Appellant and
Real Party In Interest,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent, Appellee and
Plaintiff.

Petition for Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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17 pp

ISSUES PRESENTED

(1) Where a federal agency (FDIC) has entered into a written settlement of civil litigation initiated by it providing for the unconditional release and dismissal of all unadjudicated claims "arising out of, or incidental to, (1) the Action [itself] [or] (2) the events giving rise to the Action " -- which Settlement Agreement was then twice ratified and approved by the District Court (with no pertinent reservation of jurisdiction) -- **does the District Court thereafter have jurisdiction** to entertain and grant a motion by the federal agency against the attorneys for the settling defendant for a refund of attorneys fees previously paid (allegedly in violation of a preserve-the-status-quo Preliminary

Injunction) in light of cases such as Gompers v. Bucks Stove & Range Co., 211 U.S. 418 (1911) holding that following a dismissal of a civil action a District Court no longer has jurisdiction to enforce a pendente lite preliminary injunction?

(2) As a matter of public policy, to what extent may a plaintiff federal agency influence ("chill"?) a citizen's right to the effective assistance of counsel by challenging counsel's strategic and tactical professional decisions in multi-party high-stakes civil litigation, with potential criminal follow-on consequences for the client, and requiring a refund of attorney's fees earned and litigation costs expended if a District Court decides after the fact that the defense attorney has failed to prove that said fees and costs were not earned and incurred in violation of a

preliminary injunction allowing the citizen-defendant to only pay counsel's "reasonable professional statements"?

(2)(a) To the extent that such second-guessing is permissible at all, may the burden of proof be imposed upon counsel to prove his and his client's innocence of the alleged violation of the preliminary injunction?

(2)(b) What is the appropriate standard for judging the "reasonableness" of attorney's fees incurred in defense of civil litigation initiated by an agency of the federal government? In particular, may attorney's fees be adjudged to be "unreasonable" simply because they do not correlate to any then-pending motion?

(3) Given FDIC's Notice of Motion, did the District Court's retroactive shifting of the burden of proof violate Appellant's rights to Due

Process Notice?

(4) Was FDIC's right to seek a refund from K&M for allegedly excessive or unreasonable payments to K&M for attorney's fees and costs dependent upon the Ferm's purported assignment to FDIC of their potential chose in action against K&M? Should such an assignment be universally regarded as illegal and void because contrary to public policy (as the California courts have held)?

(5) Was the 1987 Injunctive Order allegedly violated sufficiently specific to be enforceable in any event?

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit was rendered by an unpublished Memorandum opinion, filed February 8, 1993, the text of which appears in the separately-bound Appendix to this Petition beginning at page one thereof. There was a prior appeal (relating to a different order of the District Court that governed the relationship of the parties subsequent to November 1, 1988) which petitioner believes is not directly pertinent to the present appeal (which is based upon an earlier order that governed the period between October of 1987 and October of 1988), but is pertinent to an overall understanding of the context of the present appeal. This prior appeal is reported at 909 F.2d 372. No question

regarding the order affirmed on the prior appeal is presented by this appeal.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered February 8, 1993, and petitioner's timely petition for rehearing was denied April 21, 1993. This court has discretionary jurisdiction pursuant to 28 U.S.C. § 1224(1) [certiorari after a decision by the United States Court of Appeals].

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, ETC. (Rule 14(f))

Petitioner believes that this case is governed entirely by decisional law. Since there is a question of fundamental federal court jurisdiction involved, the cases are, of course, ultimately

interpreting the meaning of Article III of the United States Constitution. There is also a Due Process Notice and Opportunity to be Heard question, so that familiar constitutional requirement is also involved. Many of the pertinent cases interpret the implications of Federal Rules of Civil Procedure, Rule 41 (voluntary dismissals and dismissals by stipulation). For all practical purposes, the decisions of the courts below, and the parties' legal briefs, turn entirely upon the facts of record and decisional law.

STATEMENT OF THE CASE

This is an appeal from a post-judgment -- more precisely, a post-Stipulated Dismissal of Unadjudicated Claims, and Order thereon -- Order by the District Court to Repay Unreasonably

Incurred Attorneys Fees and Costs received by Petitioner, the law firm of Kurahara & Morrissey ("K&M"), allegedly in violation of a preserve-the-status-quo preliminary injunction.

After FDIC had joined in a written Stipulation for Dismissal of all unadjudicated claims arising from FSLIC/FDIC's First Amended Complaint against Kimberleigh and LaVonne Ferm, which the District Court had ratified and approved [App. 20-23], which unconditionally dismissed all unadjudicated claims, FDIC subsequently filed a Notice of Motion for an order requiring K&M to pay to FDIC some $581,680.42 of alleged unreasonably incurred attorneys fees and costs that the Ferms had previously paid to K&M or, in the alternative, an order requiring an accounting by Appellant K&M (counsel for the Ferm Defendants in the underlying

litigation) [App. 87-90].

Although styled as a "motion", the correct character of the proceedings below has been that of a Civil Contempt Proceeding, since the gravamen of FDIC's grievance is that K&M allegedly violated a preserve the status quo Preliminary Injunction that the District Court had made in 1987.

On June 26, 1991, the District Court made a tentative ruling granting FDIC's motion on the rationale that "[t]he fee applicant [K&M] has the burden of producing satisfactory evidence . . . that the claimed rate and number of hours are reasonable." [see App. 53]. After recalculating the figures that FDIC had proferred, the District Court made its final ruling on August 8, 1991, penalizing K&M Three Hundred Ninety-eight Thousand Eleven Dollars and Ninety-seven Cents ($398,011.97) for not having

already volunteered the accounting re the 1987-1988 period in question that FDIC had requested as alternative relief [App. 46-48]. No court order requiring K&M to provide an accounting re the 1987-1988 period in question had ever been made. This appeal follows. The Court of Appeals for the Ninth Circuit affirmed the Order in an unpublished Memorandum Opinion [App. 1].

STATEMENT OF FACTS

On September 16, 1986, FSLIC (FDIC's predecessor in interest) filed the underlying civil action against John Molinaro, and others, seeking recoupment of millions of dollars that had allegedly been misappropriated from Ramona Savings and Loan. Jurisdiction of the underlying litigation was based upon 28 U.S.C. §§ 1331 and 1345, and 12 U.S.C. § 1819

[basically an action where the Federal Government is a plaintiff].

On June 1, 1987, FSLIC filed its First Amended Complaint, adding, in pertinent part, Kimberleigh Ferm (Mr. Molinaro's former wife) and her Mother, LaVonne Ferm. The Ferms hired Appellant, K&M, to represent their interests in the underlying civil action.

Approximately four months later, in October of 1987, FSLIC secured a TRO, and in due course a preliminary injunction, against Kimberleigh Ferm freezing all of her assets pendente lite, except for Two Thousand Dollars ($2,000) per month for reasonable living expenses, plus what may be "necessary" to retain counsel [CR 404, 449]. On November 9, 1987, a Stipulation and Order modifying the preliminary injunction was filed. In pertinent part, the modified preliminary injunction allowed Ms. Ferm to withdraw up to Five

Thousand Dollars ($5,000) per month for reasonable living expenses, plus funds to pay K&M's "reasonable professional statements." [See App. 18-19.]

On April 26, 1988, FSLIC filed a motion for an accounting by K&M and repayment of alleged unreasonable charges for attorneys' fees and costs [CR 919]. The Ferm Defendants opposed the motion, contending, inter alia, that providing FSLIC with copies of K&M's monthly statements to its clients threatened to impermissibly intrude upon the attorney/client privilege and the work product doctrine [CR 979]. The District Court adopted a middle ground, denying FSLIC's Motion without prejudice to refiling at the conclusion of the litigation [CR 1053].[1]

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[1]Quoting the Docket Entry: "The Court denies plaintiff's motion in its entirety without prejudice to refiling at the conclusion of this litigation. Since

On November 11, 1988, FSLIC moved for a less ambitious order, this time requesting only that K&M submit its monthly statements to the District Court for in camera review and approval [CR 2098]. This motion was granted on December 27, 1988 [CR 2184], and affirmed on appeal [909 F.2d 372]. While the prior appeal was pending, K&M fully complied with the Order of December 27, 1988.

Except for the month of November of 1988 (which FDIC's post-dismissal motion had carelessly double-counted),[2] there

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plaintiff has access to Ferm's bank records, it can monitor amounts withdrawn for fees and then move for an accounting of the entire amount once trial is completed. At that time, it would appear that no countervailing interests of Ferm or her counsel would come into question."

[2]The District Court had previously determined that $25,898.50 constituted a reasonable attorney fee for the month of November of 1988 [CR 1988]. FDIC's motion sought repayment re November of 1988, overlooking the District Court's

is no present dispute re the period governed by the Order of December 27, 1988. Rather, the present dispute relates entirely to what may be termed the "gap period" -- the time between the entry of the above-described "freeze order" (the October 7, 1987, TRO) and the effective date of the December 27, 1988, in camera accounting order (treated as effective on November 1, 1988, by the parties and the District Court; see CR 2248).

Eventually, FSLIC/FDIC and the Ferm Defendants forged a compromise settlement of the underlying litigation. K&M made a routine motion for determination that the settlement was in good faith vis-a-vis the other defendants (so as to foreclose follow-on cross-complaints for indemnity or contribution; see Cal. Code of Civil

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prior final order regarding that month.

Procedure § 877.6) [CR 2601-2063]. FDIC joined in the good faith settlement motion [CR 2604], and the District Court granted the good faith settlement motion [CR 2613]. No mention of any reservation of jurisdiction to entertain a motion by FDIC against K&M re alleged excessive fees in 1987-1988 appears in either party's papers regarding this good faith settlement motion.

After the District Court had approved the good faith settlement motion, FDIC and the Ferm Defendants filed their Stipulation for Dismissal of Unadjudicated Claims, which the District Court ratified [App. 20-23]. Once again, the parties' Stipulation is entirely silent re any sort of reservation of jurisdiction to subsequently adjudicate any claim by FDIC against K&M for repayment of allegedly unreasonable fees and costs received during the 1987-1988

"gap period."[3]

Having resolved the litigation against the Ferm Defendants by compromise settlement,[4] FDIC then promptly reneged upon the plain meaning of its Settlement Agreement and Stipulation for Dismissal of Unadjudicated Claims by filing a motion seeking adjudication of its previously unadjudicated claim against Ms. Ferm/K&M re an alleged violation of the 1987 preliminary injunction/freeze order [CR 2635; see App. 87-90].

It is axiomatic that, in the absence

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[3]The Stipulation was filed on March 6, 1991, and the Ratifying Order was entered the next day, March 7, 1991 [see App. 20]. No appeal was taken by either side from this Ratifying Order, which is therefore now final.

[4]The Settlement Agreement and Release expressly recited that it inured to the benefit of the parties and their respective attorneys [App. 84, ¶19], and expressly promised to dismiss and release both all unadjudicated claims arising from the action itself and the events giving rise to the action [App. 78-79, ¶14].

of a court order to the contrary, the burden of proof upon a motion falls upon the shoulders of the moving party (FDIC here). Since the true character of FDIC's "motion" is that of an Order to Show Cause re Civil Contempt [see Gompers v. Bucks Stove & Range Co., 211 U.S. 418 (1911)], the burden of proof that FDIC should have been required to shoulder was proof by clear and convincing evidence [Matter of Battaglia, 653 F.2d 419, 422, 424 (9th Cir. 1981); Fox v. Capital Co., 96 F.2d 684, 686 (3rd Cir. 1938)].

So viewed, FDIC's "motion" failed seriously to carry its burden of proof. The District Court rejected FDIC's contention that K&M's billing rates were unreasonably high [App. 52-53] and also found FDIC's arithmetic to be less that satisfactory [App. 47, fn. 1]. Well over half of the challenged hours were said to be "inadequately documented" because

FDIC's counsel could not conveniently match-up the services rendered with whatever may have been the pending motion or ex parte application of the week [see CR 2635, Lee Decl., p. 24, lines 19-21].[5]

More fundamentally, the District Court simply lacked jurisdiction to hear and determine FDIC's "motion." Reduced to its bare essentials, FDIC's "motion" was an effort to redress an alleged violation of the preserve-the-status-quo pendente lite preliminary injunction that the District Court had issued back in

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[5]This is a dubious proposed Legal Standard, since review and study of the documentary evidence is a necessary and proper incident of counsel's duty to prepare for trial -- a task that is entirely independent of whatever pleading or discovery squabbles might arise along the way to trial. Incredibly, the District Court "essentially adopted plaintiff's analysis of K&M's billing statements," [App. 40:2-4], and thereby erroneously applied this incorrect legal standard.

1987. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 445, 451-452 (1911) -- recently favorably cited by this court in Cooter & Gell v. Hartmarx Co., 496 U.S. ___, 110 L.Ed.2d 359, 375-376 (1990) -- squarely holds that the right to complain about alleged violations of pendente lite preliminary injunctions evaporates upon compromise settlement of the underlying case.

FDIC's original moving papers had merely assumed that the District Court had jurisdiction to entertain FDIC's refund motion [CR 2635]. K&M correctly noted that, since the case had been dismissed, there was no longer a pending case (a fundamental requisite to jurisdiction) [CR 2642, p. 5]. In its not-subject-to-rebuttal Reply Papers filed a few days before the hearing on the Motion, FDIC "sandbagged" its initial presentation of the purported basis for

jurisdiction [CR 2644].[6] The District Court agreed with FDIC's interpretation of Commodity Futures Trading Com'n v. Co Petro Mktg., 700 F.2d 1279 (9th Cir. 1983) [App. 50:4-15, is traceable to nearly identical language in FDIC's Reply Papers at CR 2642, p. 4]. (The "lesson" of the Commodity Futures case championed by FDIC, and endorsed by the District Court, is merely 180° contra from the actual holding of the Commodity Futures case.)

Although the District Court agreed in general principle with FDIC's legal position, it was not entirely satisfied with FDIC's calculations, and so the motion was taken under submission. While

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[6]None of the eight cases cited in FDIC's ten-page belated attempt to demonstrate jurisdiction involved a disposition of the underlying case by compromise settlement and Stipulated Dismissal, or any other sort of dismissal of the underlying case.

the motion was still under submission, on August 5, 1991, K&M filed a motion to vacate the order of the submission and dismiss the proceeding, briefing in greater detail what K&M had earlier considered to be the self-evident proposition that a court's jurisdiction over a formerly pending case evaporates upon compromise settlement and stipulated dismissal of the case [CR 2648]. K&M's motion to vacate [etc.] also questioned the propriety of the District Court's sua sponte June 24, 1991, Tentative Ruling that K&M had the burden of proof that it was innocent of FDIC's allegations that K&M was guilty of civil contempt (violation of the preliminary injunction).

Two days later, on August 7, 1991, the District Court filed its Order to Repay Unreasonably Incurred Attorney's Fees and Costs [App. 24-55], which is the

object of this appeal.

On appeal, K&M cited over a dozen cases on the jurisdictional issue, and (incredibly) FDIC contended that the cases cited by K&M had been overruled by Cooter & Gell [App. Opening Brief 10-24; Brief of Appellee 31]. The Ninth Circuit's Memorandum Opinion addressed none of the jurisdictional authorities discussed by the parties, holding that the settlement agreement preserved the jurisdiction that Gompers authoritatively teaches expires upon dismissal [App. 5]. Numerous cases, including American Fire & Casualty Co. v. Finn, 341 U.S. 6, 18 (1951), which the Ninth Circuit was duty-bound to follow, hold that if jurisdiction is absent, it cannot be conferred by waiver, estoppel, consent, agreement or stipulation [accord: Morongo Band of Indians v. Cal. St. Bd. of Equal., 858 F.2d 1376, 1380 (9th Cir.

1988)].

Probably the most important public policy issue presented by this appeal concerns the character of the proceeding below and the claim that FDIC was asserting. The District Court and the Court of Appeals took fundamentally different views -- neither of which is tenable -- with the anomalous result that the Court of Appeals affirmed the order in the face of K&M's jurisdictional objection by holding that the District Court had jurisdiction to do something ("enforce the settlement agreement" [see App. 5]) that the District Court had expressly held it was not doing [see App. 50-51, ¶2].

As part of the settlement agreement between FDIC and K&M's clients, FDIC had insisted that K&M's clients assign to FDIC all claims and choses in action that

the clients might have against K&M.[7] (In the absence of such an assignment, of course, any right to a refund for alleged overcharges for attorneys' fees and costs

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[7]The assignment provision is the "Paragraph 2(d)" obliquely referred to in Chapter I of the Court of Appeals' Memorandum opinion. This sub-paragraph provided as follows:

> "(d) The Ferms shall transfer and assign all right, title and interest they have in any claims or choses in action against Kurahara & Morrissey or any member or employee thereof, hereby waive the attorney client and attorney work product privileges with regard to all sums paid to Kurahara & Morrissey from the BankCal Accounts, agree to provide to FDIC within seven days of the effective date copies of all retainer agreements and amendments thereto and all invoices for fees and costs received from Kurahara & Morrissey which are in their possession, and agree to cooperate with FDIC in any motion for accounting and/or motion for repayment of attorneys' fees paid from the Bank of California accounts by, inter alia, consenting to be interviewed and providing truthful information concerning the services rendered in return for those fees and signing a declaration in support of any such motion. A copy of said assignment agreement is attached as Exhibit 4 to this Agreement." [App. 66-67.]

would belong to the client rather than the litigation adversary.) Two extremely well-reasoned California Court of Appeal decisions[8] hold that such assignments are void because they are contrary to public policy. When K&M raised the issue in the District Court, FDIC expressly denied that it was relying upon the assignment provision in the settlement agreement [CR 2644, p. 12], and the District Court agreed [App. 50-51, ¶2]. Accordingly, the District Court made no effort to determine whether FDIC had, on the merits, any enforceable rights against K&M pursuant to the settlement

[8]Jackson v. Rogers & Wells, 210 Cal.App.3d 336, 258 Cal.Rptr. 454 (1989); Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 289, 133 Cal.Rptr. 83 (1976). Significantly, one of the claims held non-assignable in Jackson was based upon an allegation that the attorneys had intentionally performed "unnecessary, unreasonable and improper legal and related services" [210 Cal.App.3d at 346].

agreement.

Rather than determine whether the District Court had jurisdiction to do what it candidly indicated it was doing -- determine FDIC's "rights under the Court's preliminary injunction" [App. 51:10-14] -- which would have required confronting the fact that this court's decision in Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) authoritatively holds that such jurisdiction is lacking following a dismissal, the Court of Appeals held that the District Court had jurisdiction because FDIC and the Ferms had agreed that the District Court would retain jurisdiction to enforce the settlement agreement [App. 5]. Since the proceeding in the District Court was not one to enforce the settlement agreement, the Court of Appeals' jurisdictional rationale does not justify what the

District Court actually did. Moreover, if the proceedings in the District Court had been to "enforce the settlement agreement," this would have required holding FDIC to its promise to dismiss and release all of its unadjudicated claims arising from the action [App. 78-79] and recognizing that the rights purportedly assigned to FDIC under the settlement agreement are unenforceable because such an assignment is illegal and void because it is contrary to public policy. (It is also questionable whether any agreement between FDIC and the Ferms to preserve jurisdiction could be used against K&M because, by requesting this assignment, the FDIC thereby created a conflict of interest between the Ferms and K&M.)

The Memorandum Opinion of the Court of Appeals ignores the important public policy questions presented by K&M's

appeal and handsomely rewards FDIC for deceitfully promising as part of a compromise settlement of litigation it had initiated to dismiss and release all unadjudicated claims arising from the action and then turning around and seeking adjudication of a previously unadjudicated claim.

REASONS FOR GRANTING THE WRIT

(1) The Case Presents Important Questions of Public Policy Which Should be Settled by This Court.

In addition to the comprehensive lack of uniformity between this decision, and all of the over forty decisions addressed in K&M's briefs -- none of which are addressed in the Memorandum opinion by the Court of Appeals -- the

instant case presents questions of exceptional public importance, although the Memorandum does not reach or address them.

As a matter of public policy, the power/right that FDIC asserts to second-guess the "reasonableness" of its legal adversary's attorneys fees is very dubious in a nation that believes in the Anglo-American form of adversary system. The situation here is similar to the deplorable tactic recently condemned by an ethics committee of the Georgia State Bar where a prosecutor negotiated a waiver of defense counsel's claim for attorney's fees as part of a plea bargain [see ABA Journal, May 1993, p. 28]. According to the ABA Journal article, the practice is all too common in settlement negotiations in civil cases involving the federal government. The practice is plainly contrary to public policy because

it allows the government to create a conflict of interest between the citizen being sued by the government and that citizen's attorney. Similar considerations have led the California courts to declare the practice of a litigant's assigning his potential claims against his own attorney as part of a settlement of a civil case to be contrary to public policy.

The instant case presents a vivid example of the danger of this sort of second-guessing. One of the major alleged indicia of "unreasonableness" urged by FDIC was the decision by the Defendants' attorney to attend a number of depositions that had been noticed by FDIC. Permitting this sort of second guessing places the attorney attempting to defend his client against serious claims by the government in an untenable position. If he decides to not attend

the deposition, this will presumably make the legal adversary (FDIC) happy, but this option exposes counsel to potential criticism (conceivably, even a claim for lack of diligent representation) from one's own client. To the extent that there might be a disagreement between FDIC's attorney and one's client as to whether attending the deposition of Witness X is "reasonable" or not, counsel's duty to his own client must be paramount whether the opposing litigant, such as FDIC, likes it or not. This is especially so since it is not at all unusual for a deponent's testimony to turn out to be "surprisingly" more important than one would have anticipated prior to hearing the testimony. Indeed, even if the witness turns out to have little, if anything, worthwhile to contribute, it is a reasonable and permissible professional service to

attend the deposition if only to find out that a potential witness is not important enough to justify calling (or worrying about) at the time of trial. It is also rather hypocritical, and contrary to our society's concept of a citizen's right to the effective assistance of counsel in litigation initiated by the government, to argue that it is "unreasonable" for a defendant's attorney to attend a deposition that has been noticed and is being taken by the government's attorney.

It must be born in mind that the type of case we are speaking of here is one where the federal government is the plaintiff, and the question is what is reasonable to defend against the litigation attack that the government has launched. It may well be that a different rule should obtain where the citizen sues the government, but where the federal government is the litigation

aggressor, allowing the government any power or right to second guess something as vague as the "reasonableness" of the defense strategy treads upon very sensitive ground, for obvious public policy reasons.

Taken to its extreme, what would make a plaintiff happiest is if the defendant has no right to counsel at all, which is obviously against public policy. The right/power that FDIC asserts here is different in degree, but not really in kind. It is just as socially intolerable to allow the government to sue a citizen and then contend that the citizen is only entitled to half (or a third?) as diligent a defense as the citizen and the citizen's attorney consider best. Once the Law allows this sort of second-guessing at all it becomes a virtual impossibility to draw the line. [Some genies need to be kept entirely within

the bottle. In a similar vein, some types of "satellite litigation" are best not sanctioned at all.]

The instant case is only one of what are surely hundreds of cases nationwide where FDIC is compelling citizens to defend themselves against highly aggressive and threatening litigation initiated by FDIC. Although the Memorandum opinion of the Court of Appeals is not published, and cannot be cited as precedent per se, the proceedings here cannot help but encourage FDIC to attempt to engage in similar exercises in second-guessing its litigation adversary's strategy decisions in all of the other cases in which it is involved nationwide. If the second-guessing exercise is contrary to public policy -- and it is certainly questionable, and deserving of serious judicial consideration -- consideration

by this Court would certainly be appropriate. As the May 1993 ABA Journal article suggests, this tactic of attempting to undermine the effectiveness of the assistance of legal counsel received by citizens involved in legal controversies with the federal government appears to be quite widespread.

The instant case also presents a serious question of whether the federal courts can be relied upon to play their historically classic role of protecting American citizens from excesses and abuses by the Executive Branch. The Settlement Agreement entered into by the government here included an unconditional promise by the government to dismiss and release all unadjudicated claims arising from both the Action itself, and the facts giving rise to the action [App. 78-79]. FDIC's rights under the preliminary injunction that the District Court

believed it was entitled to adjudicate had been bargained away (in exchange for the illegal assignment of the Ferms' potential rights against their own attorneys) as part of the settlement process. Since the underlying case had been compromised and dismissed, FDIC had no remaining rights under the preserve-the-status-quo preliminary injunction in any event, since FDIC had no rights whatsoever to any of the moneys in the frozen bank account unless and until it prevailed at trial. (The District Court's belief that it had, in 1987, created some rights in favor of FDIC reflects a fundamental misunderstanding of the nature of a preserve-the-status-quo preliminary injunction.)

When citizens enter into a formal settlement agreement with an agency of the federal government, whereby the agency unconditionally promises and

agrees to dismiss and release all unadjudicated claims arising from the Action itself in addition to the facts giving rise to the action [App. 78-79], and further expressly agrees that the settlement agreement inures to the benefit of the settling defendants' attorneys [App. 84, ¶19], the citizens are entitled to expect the federal government agency's promise to be kept.[9]

If the agency then breaks its promise, the citizens are entitled to expect the federal courts to make the Executive Branch stand by its word, and

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[9]The Court of Appeals' reliance upon events and 1987-vintage "understandings" [App. 5-6] is Legally Irrelevant. The 1990 Settlement Agreement had an integration clause [App. 83-84, ¶18] and an express warranty that FDIC was not relying upon anything said outside of the agreement [App. 80-81, ¶16(b)]. 1987-era statements and understandings are thus irrelevant under the Parol Evidence Rule, which is a rule of substantive law in California [Tahoe Nat. Bank v. Phillips, 4 Cal.3d 11, 22, 92 Cal.Rptr. 704 (1971).

that simply has not occurred here.

(2) The Decisions of the Courts Below Conflict with Applicable Decisions of This Court, and Several Court of Appeals Decisions, Regarding Jurisdiction to Entertain This Sort of Proceeding.

Every federal appellate court has a "special obligation" to satisfy itself of the jurisdiction of the lower court in a cause under review [Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). This court's major and oft-cited decision in Gompers v. Bucks Stove & Range Co., 211 U.S. 418 (1911) squarely holds that a court's jurisdiction to enforce by civil contempt alleged violations of a preliminary injunction evaporates upon dismissal of

the underlying case. Neither the District Court or the Court of Appeals has published a single word attempting to reconcile their actions with this Court's authoritative Gompers decision. Both have simply ignored the problem and refused to follow controlling precedent (extremely well-settled precedent, no less) established by this court.

The lower courts' refusal to follow Gompers would alone be enough to justify supervisory intervention by this Court, but Gompers hardly stands alone. A long and consistent line of authority holds that, following a voluntary dismissal by the plaintiff, or a stipulated dismissal, the Court loses jurisdiction.

Santiago v. Victim Services Agcy. of Metro. Assist., 753 F.2d 219 (2nd Cir. 1985) seems especially similar to the facts of the instant case. In Santiago, following the hearing on an application

for preliminary injunction, the court denied the preliminary injunction and granted the defendants' motion for leave to submit an application for attorneys fees. A few days thereafter, on June 20, 1983, the plaintiffs filed a notice of voluntary dismissal. Nearly two months later, the defendants brought their motion for an award of attorneys fees, and the motion was eventually granted on February 7, 1984 [753 F.2d at 220-221].

The Court of Appeals reversed the attorneys fee award, observing that once the plaintiff had dismissed the action, the District Court had lost jurisdiction over the action [753 F.2d at 221]. At page 223, the Second Circuit concluded:

> ". . . It is quite plain that the district court lost all jurisdiction over the case when appellants dismissed the action. The court had no

authority to reserve jurisdiction, (Citation), or to attach any conditions to the unilateral right to dismiss."

Of particular interest to the facts of the instant case is the court's discussion, at page 222, of the statement that the trial court had made at the hearing on the attorneys fee award to the effect that it had reserved jurisdiction. The Court of Appeals disagreed, commenting:

"First, the record is barren of any indication that the court reserved jurisdiction over the attorney's fees issue prior to the statement to that effect in the court's February 7, 1984 opinion. Although at the conclusion of the evidentiary hearing on June 8,

> 1983, the court granted appellees' motion for leave to apply for an award of attorney's fees, the notice of dismissal itself, . . . which the court signed on June 17, 1983, made no reference to fees or costs and was completely unconditional. [Emphasis added.]

Similarly, the Stipulation and Dismissal in the instant case is also completely unconditional re any follow-on claim for a refund of previously paid attorneys fees or costs.

Smith v. Phillips, 881 F.2d 902 (10th Cir. 1989) is likewise very instructive. In that case, after a number of the defendants had been dismissed on pleading challenges or summary judgment, the plaintiffs reached

a compromise settlement with the remaining defendants. The parties agreed that the terms of the settlement should be confidential, but the District Court disagreed. After the settling parties had filed a Stipulation for Dismissal, the District Court, sua sponte, ordered that the terms of the settlement be made available to the public, and threatened contempt proceedings.

The Court of Appeals granted writ relief, holding that the Stipulation for Dismissal had divested the District Court of any further jurisdiction, explaining:

> "A voluntary dismissal by stipulation under Rule 41(a)(1)(ii) is of right, cannot be conditioned by the court, and does not call for the exercise of any discretion on the part of the court. (Citations.) Once the

stipulation is filed the action on the merits is at an end. (Citations.) We agree with the Seventh Circuit that "[a]n unconditional dismissal terminated federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [Fed.R.Civ.P.] 60(b)."

A district court, however, is powerless to condition a dismissal under Rule 41(a)(1)(ii) upon a retention of jurisdiction, and, indeed, it did not attempt to do so in the instant case." [Emphasis added.]

As in Santiago, supra, the Court of Appeals in Smith v. Phillips, supra, held

that, unless expressly reserved in the order of dismissal, what the unexpressed intent of one of the parties, or the court, may have been is irrelevant:

> "The judge next argues that a fair reading of the record disclosed that he did not intend to abandon all jurisdiction in the case by signing the dismissal order. It may be that he did not intend to abdicate jurisdiction, but the filing of the stipulated dismissal with the court ended the case notwithstanding the court's alleged contrary intention."

In Williams v. Ezell, 531 F.2d 1261 (5th Cir. 1976), plaintiffs filed a "Motion for Dismissal" which the Court of Appeals construed as a Rule 41(a)(1)(i)

Notice of Voluntary Dismissal. The District Court denied the "motion" and later made an attorneys fee award in favor of the defendant. The Court of Appeals reversed, commenting:

> ". . . At the time plaintiffs filed their motion to dismiss the case was effectively terminated. The court had no power or discretion to deny plaintiffs' right to dismiss or to attach any condition or burden to that right. That was the end of the case and the attempt to deny relief on the merits and dismiss with prejudice was void. Likewise, except for determining appealability, the subsequent orders granting attorneys fees were a nullity. [531 F.2d at 1263-1264;

emphasis added.]

In Scam Instrument Corp. v. Control Data Corp., 458 F.2d 885, 889 (7th Cir. 1972), the court held that, following a Rule 41(a)(1)(i) voluntary dismissal, ". . . any further action by the district court was neither necessary nor of any effect." [Emphasis added.]

One of the important legal consequences of a dismissal is that it ". . . leaves the situation the same as if the suit had never been brought in the first place." Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959).

In National R. R. Passenger Corp. v. IAMAW, 915 F.2d 43, 48 (1st Cir. 1990), the First Circuit recently explained this legal consequence as follows, citing numerous authorities:

"Of course, it is well

> settled that [t]he effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought. (Citations.) This means that the dismissal "carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim." (Citation.)" [Emphasis added.]

In a similar vein, in the oft-cited case of A.B. Dick Co. v. Marr, 197 F.2d 498, 502 (2nd Cir. 1952), the Second Circuit explained the Legal Effect of a dismissal, even when the court had affirmatively denied a motion to vacate a

prior judgment -- the equivalent of the "freeze order" in the instant case -- as follows:

> ". . . But at the same time that the court denied the defendant's petition to vacate and set aside the decree and judgment, it granted the plaintiff's motion to dismiss its entire case and entered an order of dismissal with prejudice. And this action of the court was the equivalent of vacation of the judgment theretofore entered in the case in the plaintiff's favor, so that, perhaps, the court would have been well advised to have entered on its own motion an order vacating that judgment. (Citation.) The reason for this is that voluntary

dismissal of a suit leaves the situation so far as procedures therein are concerned the same as though the suit had never been brought, (Citation), thus vitiating and annulling all prior proceedings and orders in the case, and terminating jurisdiction over it for the reason that the case has become moot. (Citations.)" [Emphasis added.]

See also Bryan v. Smith, 174 F.2d 212, 215, (7th Cir. 1949) where the court observed:

"If the rule is that dismissal leaves the situation as if the suit had never been filed, what right of procedure could possibly stem from something that never existed?

> If this suit had never been brought, how could this ancillary proceeding ever have been started? To ask the question answers it. . . Since the suit had been dismissed, the ancillary proceeding was a nullity." [Emphasis added.]

See also Ford v. Sharp, 758 F.2d 1018, 1023-1024 (5th Cir. 1985) ("If a plaintiff voluntarily dismisses an action without prejudice, it is considered that the suit had never been filed.")

In LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 603, (5th Cir. 1976), the court expressed the rule thusly:

> ". . . The effect of this type of dismissal is to put the plaintiff in a legal position as if he had never brought the first suit."

Given this well-established[10] Legal Effect, since the case has been dismissed as between FDIC and the Ferm Defendants, the District Court is, in legal contemplation, endeavoring to enforce an injunction that is no longer viable.

(3) The Cases Relied Upon by the District Court do not Suffice to Show That the Court has Jurisdiction in the Instant Case.

The District Court's reliance upon League of Women Voters of California v. F.C.C., 751 F.2d 986, 990 (9th Cir. 1985) and Commodity Futures Trading Com'n v. Co Petro Mktg., 700 F.2d 1279, 1282 (9th

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[10]Loeb v. Willis, 100 N.Y. 231, 3 N.E. 177 (1885) -- discussed in Bryan v. Smith, 174 F.2d 212, 214 (7th Cir. 1949) -- is over a century old, which certainly earns this legal principle the status of "well established."

Cir. 1983) is misplaced. Both cases are readily distinguishable. First and foremost, neither case involved an Unconditional Dismissal.

League of Women Voters correctly states a number of familiar rules relating to cases that have been tried and reduced to judgment, but the instant case was resolved by compromise settlement and dismissal of all unadjudicated claims.

We would readily agree that the question of whether the fee payments to K&M were in violation of the preliminary injunction may be regarded as "collateral" to the question of Ms. Ferm's basic liability under FSLIC/FDIC's First Amended Complaint -- provided that it is also recognized that it was an unadjudicated "collateral claim," and therefore had been dismissed by stipulation and Ratifying Order [App. 20-

23].

Moreover, given the Unconditional Dismissal procedural posture that actually evolved in the instant case, the question must be asked: collateral to what? Certainly not to a pending case. As the discussion of the Kiser case in Bryan v. Smith, 174 F.2d 212, 214-215 (7th Cir. 1949) indicates, a court's ability to enforce its prior orders by civil contempt depends upon a pending suit. Accord, Gompers v. Buck Stove & Range Co., 211 U.S. 418, 451-452 (1911). This is a natural corollary of the rule (see Chapter 2, supra) that an unconditional dismissal "carries down" with it the pleadings and orders previously made in the case.

At first glance, the Commodity Futures case may have a superficial appeal as worthwhile precedent since it did involve disgorging a law firm of

funds it had arguably received in violation of a preliminary injunction.

But Commodity Futures is fundamentally different from the instant case. Most fundamentally, the Commodity Futures case did not involve an Unconditional Dismissal. The case was very much still pending, and indeed the District Court had explicitly retained jurisdiction to implement and carry out the terms of its injunctive order [700 F.2d at 1281].

In Commodity Futures, the claimed jurisdictional bar arising from the automatic stay provisions of the Bankruptcy Code was subject to an express exception in the Bankruptcy Code for police or regulatory action. This is the holding of the Commodity Futures case on the "jurisdiction issue." As the cases cited above uniformly demonstrate, there is no comparable "exception" to the loss

of jurisdiction that arises following dismissal of the action.

In its Tentative Ruling of June 24, 1991 [App. 50], the District Court characterized the lesson of the Commodity Futures case as being that a District Court has continuing jurisdiction to enforce the terms of a preliminary injunction by requiring attorneys who receive funds in violation of the injunction to return the funds even though the Court no longer has jurisdiction over the remainder of the action.

That is most emphatically not the holding of the Commodity Futures case. Nowhere in the Commodity Futures opinion is there a holding that the District Court there lost jurisdiction over any portion of the case before it. The actual holding of the Commodity Futures case is precisely to the contrary (i.e.,

that there was no loss of jurisdiction because the case fit squarely within an express exception to the automatic stay) [see 700 F.2d at 1283-1284].

There was no legitimate jurisdictional problem in the Commodity Futures case for yet another reason, though the Commodity Futures opinion does not happen to emphasize it. What was at stake in Commodity Futures was the District Court's jurisdiction over the Loo, Merideth & McMillan law firm. Even if the automatic stay due to the Co Petro Bankruptcy Petition had been applicable, that by no conceivable stretch of the imagination would have stayed the District Court's exercise of jurisdiction over the Loo law firm, because the Loo law firm was not itself in bankruptcy.

In short, the District Court's jurisdiction theory is untenable.

(4) The District Court, Without Appropriate Due Process Advance Notice, Improperly Shifted the Burden of Proof Upon FDIC's Motion.

Historically, during the November of 1987 through October of 1988 era, the only applicable injunctive order was the language at App. 18-19, relating to "reasonable professional statements."

During the November of 1987 through October of 1988 period at issue here, there was **no order in effect** requiring K&M to report its services-rendered by the court-review standards that the District Court has awkwardly -- and probably unconstitutionally -- retroactively imposed upon K&M by its June 24, 1991, Tentative Ruling and August 8, 1991 Order [see App. 40-44; 53-

55].

FDIC had correctly recognized the Legal Significance of the absence of a prior "accounting order" re the 11/87-10/88 era now in question. This is why FDIC's Notice of Motion requested that, if the District Court were of the opinion that a fuller explanation from K&M were in order, the District Court would so advise K&M by making an accounting order re the twelve-month period of 11/87-10/88 [see App. 88-89]. K&M then took FDIC's Notice of Motion at face value, which it was absolutely and positively entitled to do (especially since FDIC had correctly analyzed the situation with respect to who carried the Burden of Proof.)[11]

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[11]Accordingly, K&M "defended" against FDIC's first "alternative" Request for Relief -- which FDIC correctly recognized required it to carry the burden of proof (hence the 178 pages of Moving Papers) -- by simply contending that FDIC had failed to carry its burden of proof. (Any "Calculation," such as the one attempted

Notwithstanding the correct de facto Stipulation between FDIC and K&M re who had the burden of proof, the District Court -- without any prior Notice -- retroactively shifted the Burden of Proof to K&M, and then unfairly criticized K&M for having failed to carry a burden of proof that K&M simply never had (since there had never been a prior "accounting order" re 11/87-10/88, which FDIC had judicially admitted, by its Notice of Motion, was necessary before penalizing K&M for "failing to account.")

Given the "alternative relief"

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by FDIC here, that begins with an "estimate" of fees received [see CR 2635, p. 21] has for all practical purposes failed to carry the burden of proof from the first step. [For different reasons, the District Court found FDIC's arithmetic unsatisfactory; see App. 47, fn. 1.] Also, as K&M noted at the outset, FDIC had proposed an unworkable methodology that could not feasibly be "unwound" if the District Court disagreed with FDIC on any category of charges. See CR 2642, p. 3, lines 4-8.

structure of FDIC's Notice of Motion -- which was correct pleading and properly taken at face value by K&M -- the District Court has, on its own initiative, granted judicial relief that is inconsistent with, and fundamentally in excess of, the judicial relief that FDIC gave Due Process Notice that it was requesting.

It is well-settled that, where there is a lack of proper Due Process Notice, any subsequent judicial orders based thereon are **VOID** -- the proverbial dead limb on the judicial tree. Thos. P. Gonzalez Corp. v. Consejo Nacional, Etc., 614 F.2d 1247, 1256 (9th Cir. 1980); Winhoven v. United States, 201 F.2d 174, 175 (9th Cir. 1952); In re Downtown Inv. Club, 89 B.R. 59, 62-63 (9th Cir. BAP 1988); Wright and Miller, Federal Practice and Procedure, §2862 at Vol. 11, pp. 197-200 (1973).

A District Court simply has neither the power nor discretion to, without advance notice, stand the established law re who has the burden of proof upon a motion or Civil Contempt Proceeding on its head and then penalize a citizen for failing to anticipate such a surprise sua sponte development. The retroactive shifting of the burden of proof becomes especially intolerable when the Civil Contempt character of the proceeding is recognized. It is fundamentally wrong to require an American citizen to prove his innocence.

In addition to, sua sponte, re-defining the Law re who has the Burden of Proof upon a Motion or Civil Contempt Proceeding, the District Court has also thoroughly misconstrued the Legal Significance of the November 1987 to October 1988 Statements that K&M had submitted to its client that FDIC then

disingenuously brought before the District Court as CR 2635, Exh. C at pp. 60-134.

At the time those Statements were prepared, there was no standing Court Order requiring K&M to "report" its services by the more-demanding standards that apply where an attorney intends to make a motion to require the adverse party, in the final analysis, bear both sides' litigation expense.

The fundamental difference between an attorney's Statement to one's own client -- which is ultimately a matter of the private law of contract -- and a Moving Party's efforts to prove-up a motion should be obvious. As Chief Justice Burger perceptively explained in his concurring opinion in the landmark case of Hensley v. Eckerhart, 461 U.S. 424, 441 (1983):

"A claim for legal services

presented by the prevailing party to the losing party pursuant to §1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate 'billing judgment,' ante, at 434, and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for payment under §1988."

The K&M billing statements that FDIC brought before the District Court [CR 2635, Exh. C at pp. 60-134] have never been represented by KUM as being a "court review quality" Statement of Services

Rendered. The District Court, at FDIC's unsound urging, mistreated K&M's Statements to its own client as something that the private Statements were never intended to be. At the time, K&M's only duty was to present a Statement for Services Rendered that satisfied its client's needs; the statements in question served that purpose, which is all that the attorneys' private Statement to its client need (or ever was intended) to accomplish. Hardly any clients want their bills detailed by court-review standards.

If the District Court really believed that 150, or 250, or even 350 pages of Statement is preferable to the 74 pages that were already on the record -- cf. the prudent admonition of the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) re squandering too much valuable

time and attention on these theoretically collateral attorneys' fees squabbles -- it should have said so, in advance, not retroactively.

The most elementary principles of Due Process require that a District Court must advise a citizen, and afford an Opportunity to be Heard after Notice, before shifting the burden of proof from the moving party on a motion/civil contempt proceeding to the responding party/accused contempt citee -- particulary where, as here, the parties had correctly analyzed the burden of proof in the first place.

Respectfully submitted.

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